ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

APR - 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Section	)	
302 of the Telecommunications	)	CS Docket No. 96-46
Act of 1996	)	
	)	
	)	
Open Video Systems	)	
	)	

JOINT COMMENTS OF CABLEVISION SYSTEMS CORPORATION AND THE CALIFORNIA CABLE TELEVISION ASSOCIATION

Donna N. Lampert
James J. Valentino
Charon J. Harris
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Robert Lemle
Charles Forma
Marti Green
CABLEVISION SYSTEMS CORPORATION
One Media Crossways
Woodbury, New York 11797
(516) 364-8450

Alan J. Gardner
Jerry Yanowitz
Jeffrey Sinsheimer
CALIFORNIA CABLE TELEVISION
ASSOCIATION
4341 Piedmont Avenue
Oakland, California 94611
(510) 428-2225

April 1, 1996

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section	)	
302 of the Telecommunications	)	CS Docket No. 96-46
Act of 1996	)	
	)	
Open Video Systems	)	
	)	

JOINT COMMENTS OF CABLEVISION SYSTEMS CORPORATION AND THE CALIFORNIA CABLE TELEVISION ASSOCIATION

Cablevision Systems Corporation ("Cablevision")[1/] and The California Cable Television Association ("CCTA"),[2/] (collectively "Joint Commenters")[3/] hereby submit these Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[4/]

[1/] Cablevision Systems Corporation owns and operates cable television systems in six states with over 2 million subscribers and has ownership and/or managerial interests in other cable systems which serve an additional 662,000 subscribers.

[2/] CCTA is a trade association representing cable television operators with over 400 cable television systems in California, including both small rural systems and national multiple system operators. CCTA's members are potential facilities-based competitors of local telephone companies in the provision of video services and local exchange telephone services to the public in California.

[3/] Cablevision is not a member of CCTA, as it does not operate cable systems in California. In the past, CCTA and Cablevision have not filed jointly in proceedings before the Federal Communications Commission ("FCC" or "Commission"). In response to the Commission's request that parties with similar positions file together, however, Cablevision and CCTA submit these comments jointly.

[4/] Implementation of Section 302 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, CS Docket No. 96-46 (released March 11, 1996) ("NPRM").

INTRODUCTION AND SUMMARY

The Telecommunications Act of 1996 (the "1996 Act")[5/] authorizes telephone common carriers to enter the video programming marketplace through a broad variety of strategies and technologies, including radio-based communication technologies regulated under Title III of the Communications Act,[6/] as common carriers regulated under Title II,[7/] as cable systems regulated under Title VI,[8/] or by means of open video systems ("OVS") as described in Section 653 of the 1996 Act.[9/] In creating OVS, Congress sought to create a new video services delivery mechanism to encourage the development of video competition in the marketplace and to provide consumers with a diversity of program choices.[10/]

A principal feature that distinguishes OVS from cable television service is the tenet of nondiscrimination. Although not regulated under the Title II common carriage scheme,[11/] OVS, just as with video dialtone before it, seeks to achieve nondiscrimination goals by mandating open access and by ensuring the establishment of just and reasonable rates, terms, and conditions.[12/] In return for complying with these basic obligations, OVS operators

---

5/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

6/ 47 U.S.C. § 301 et seq.

7/ Id. at § 201 et seq.

8/ Id. at § 521 et seq.

9/ 1996 Act, § 653(a)(1) (to be codified at 47 U.S.C. § 573(a)(1)).

10/ See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 172-173 ("Conference Report"). In addition, Congress sought to "encourage investment in new technologies," id. at 172, which appears to be linked to the primary goal of fostering competition in the video marketplace.

11/ Id. at 172; see also 1996 Act, § 651(a)(3)(B).

12/ 1996 Act, § 653(b)(1)(A).

qualify for reduced regulatory burdens under Title VI.[13/] Thus, although the LECs may utilize similar network facilities as cable operators, Congress intended that they act in a wholly different manner with respect to their basic programming obligations.[14/]

Joint Commenters have considerable experience with both the promise and the pitfalls of video dialtone. The proposals for and deployment of video dialtone systems by the Southern New England Telephone Company ("SNET"), Pacific Bell ("Pacific"), Bell Atlantic and others have underscored the need for vigilant enforcement by the FCC of the bedrock nondiscrimination obligation, as the incentives of the local exchange carriers ("LECs") to act anticompetitively are powerful. Consequently, in crafting the regulations for OVS, the FCC must recall the lessons of video dialtone and act so as to ensure that the discriminatory and anticompetitive behavior of the past is not repeated in the future. Indeed, with OVS, the need for firm rules is even more compelling, because Congress has required the FCC to act on any certification request within 10 days.[15/] Failure to adopt and enforce clear rules at

---

[13/] Id. at § 653(a)(1), (c); see also Conference Report at 177. In order to qualify for reduced regulation, the 1996 Act requires that open video system operators certify compliance with nondiscrimination and certain other requirements as established by the Commission. 1996 Act, § 653(a)(1), (c); see also NPRM at ¶ 5. OVS operators are exempt from Title VI provisions that require the designation of channel capacity for commercial use by unaffiliated entities; antitrafficking; the bulk of Part III that requires franchising; and Part IV's miscellaneous provisions. See 1996 Act, § 653(c)(1)(C). OVS operators certified by the Commission need only satisfy selected provisions of Title VI regarding: the provision of public, educational, or governmental ("PEG") channels; must carry; retransmission consent; certain ownership restrictions; privacy; equal employment opportunity guidelines; negative option billing; and program access. See Id. at § 653(c)(1).

[14/] For instance, Cablevision is undertaking substantial network facilities upgrades that will enable vast expansion in capacity and capabilities.

[15/] Id. at § 653(a)(1).

the outset to ensure that OVS operators do not engage in discriminatory behavior will frustrate competition and undermine Congressional goals.[16/]

Specifically, to fulfill the promise of OVS to increase competition in the video marketplace and diversify programming choices for consumers,[17/] the Commission should: establish an open, verifiable, and prospective process for the selection of video programmers and for channel allocation; ensure that OVS operators do not utilize channel sharing mechanisms to undermine the Congressional goal of a new video services paradigm distinct from cable television; and enforce all Title VI obligations that are mandated by the 1996 Act.

The Commission should also require OVS operators to demonstrate that the allocation of costs in joint use integrated networks is based upon sound economic principles. Here too, failure to ensure proper cost allocation will skew fair competition in the video marketplace to the ultimate detriment of both video and telephone consumers. All costs, including personnel and service costs, must be fairly allocated and reflected in OVS rates so that the OVS operations bear the burden of their true costs. Moreover, given the articulated public interest benefits of OVS, the Commission should permit cable operators to provide open video

---

[16/] The Commission should require, and strictly enforce, letter-perfect certification filings from all prospective OVS operators. A similar rule was implemented by the Commission in the context of cellular lotteries, where many of the same concerns arose with respect to a very short timetable to review applications. Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection Lotteries Instead of Comparative Hearings, Memorandum Opinion and Order on Reconsideration, 101 F.C.C. 2d 577, 603 (1985) (all future cellular applications must be "letter-perfect" and failure will result in rejection). By assuring that all certification filings meet this exacting standard, the Commission eliminates the possibility that changed circumstances might affect the outcome of a certification decision. This is the only way that a ten-day certification period, see 1996 Act, § 653(a)(1), can be reasonably implemented.

[17/] Conference Report at 172.

systems. Finally, the Commission should adhere to the statutory mandate that permits all video programmers, including cable operators and their affiliates, to utilize capacity on open video systems.

I. OVS IS INTENDED TO BE DIFFERENT FROM CABLE TELEVISION AND THEREFORE OVS PROVIDERS MUST ADHERE TO THE PRINCIPLE OF NONDISCRIMINATION TO QUALIFY FOR REDUCED REGULATORY OBLIGATIONS

A. The Commission Must Ensure That Open Video Systems Do Not Become De Facto Cable Systems Subject to Reduced Regulation

With the adoption of a nondiscrimination requirement, Congress intended for OVS to be fundamentally different from cable television.[18/] If the Commission is to ensure that open video systems enhance competition in the video programming marketplace, it must both target the specific discriminatory practices that have occurred in the past and establish a guiding principle of fair and nondiscriminatory competition for the future. These regulations should prescribe: (i) the manner of selection of video programmers and allocation of capacity; (ii) the development of channel sharing plans; and (iii) the provision of marketing services and other critical aspects of the service. Moreover, if the Commission is to monitor compliance, and afford the public the means to detect abuses, it should also require OVS operators to make their contracts with programmers publicly available.

[18/] At the heart of cable television is the right to exercise editorial discretion over the multichannel video system. See, e.g., Leathers v. Medlock, 499 U.S. 439 (1991). To the contrary, OVS operators may not discriminate among video programming providers and must limit their own programming to one-third of their systems where demand exceeds capacity. See 1996 Act, § 653(b)(1)(A)-(B).

1. The Selection of Video Programmers and Allocation of Channel Capacity Must Be Nondiscriminatory, Prospective, and Verifiable

a. The Commission's Rules Must Promote Congress' Nondiscriminatory Vision for OVS

Section 653 of the 1996 Act directs the Commission to promulgate regulations that prohibit an operator of an open video system from selecting video programmers or allocating capacity on an open video system in a discriminatory fashion.[19/] By establishing this requirement, Congress sought to ensure an accessible system that provides consumers with the greatest possible diversity of program choices in a manner fundamentally different from cable television.[20/]

Joint Commenters have had a multitude of experiences with LEC discriminatory practices in their deployment of video dialtone, which had a similar nondiscrimination requirement. The Joint Commenters assert that this pattern of behavior is not likely to change in the future simply because Congress has created a new regulatory structure. Thus, if the Commission is to fulfill the statutory vision for OVS, it must establish open, verifiable, and prospective regulations prescribing a selection process that: (i) includes a specific publicly-noticed time period of reasonable duration during which potential programmers may request capacity; (ii) allocates channels to programmers in a fair manner based upon the video programmers' initial requests when demand exceeds capacity;[21/] (iii) sets forth

---

[19/] Id. at § 653(b)(1)(A).

[20/] See Conference Report at 177-178.

[21/] For example, assuming 10 video programmers request 20 channels each during the initial allocation period but capacity is limited to 100 channels. A fair allocation based upon these requests would be 10 channels each, or an equal division of capacity.

procedures to decide how channel positions will be determined among video programmers; and (iv) limits the percentage of channels that an affiliated programmer may reserve. Only by detailing the terms and conditions of enrollment, programmer selection, and capacity allocation in this manner can the FCC promote regulatory efficiency and serve the public interest by fulfilling the Congressional vision.

b. The Video Dialtone Experience Teaches That the LECs Will Discriminate Absent Specific Uniform Rules

In the history of video dialtone deployment, the LECs' demonstrated strategy was to discriminate in favor of a preferred video programmer which was utilizing all, or virtually all, of the platform's available capacity through individual discussions, closed negotiations, or discriminatory channel reservation plans.[22/] In California, for example, Pacific granted significant benefits and advantages to Anchor Pacific Corporation ("Anchor Pacific"), a company in which Pacific holds a conditional purchase option.[23/] Similarly, in Connecticut,

---

[22/] See, e.g., Pacific Bell Petition for Expedited Waiver of Part 69 Rules to Permit the Establishment of Tariff Rate Elements for Video Dialtone Service, Pacific Petition for Expedited Waiver at 7 (filed Aug. 7, 1995); CCTA Opposition at 7-11, 21 (filed Oct. 2, 1995) (Pacific maintains conditional purchase option in two video programmers, which together controlled 60 percent of the analog capacity on Pacific's video dialtone platform, and established a channel reservation plan whereby Anchor Pacific and California Standard Television Corporation gained capacity and channel management in November 1993, 21 months before the existence of any first-come, first-served plan was made public); see also Application of SNET, to Amend Existing Authorization to Construct and Operate, on a Trial Basis, A Video Dialtone Platform for Provision of Programming to Subscribers, File No. W-P-C 6858, Petition to Deny of Cablevision and The New England Cable Television Association, Inc. at 39-48 (filed Sept. 26, 1995).

[23/] These benefits included assigning it the most desirable block of channels on the video platform, pre-allocating to it a majority of the available analog video capacity, and proposing volume discounts, term commitments, and marketing policies that were likely to benefit only Anchor Pacific to the detriment of other programmers. See In the Matter of Pacific Bell Tariff FCC No. 135, Transmittal No. 1834 (Channel Reservation), CCTA's Petition to Reject, or, in the Alternative, Suspend and Investigate Pacific Bell's Proposed Channel Reservation and Assignment Tariff (filed Sept. 11, 1995); Letter of July 7, 1994 to the Honorable Reed E. Hundt from Lee G. Camp, Pacific

(continued...)

SNET initially sought to allocate 49 of the 53 available broadcast channels to a single programmer with which it had a special relationship and refused to make capacity available to cable-affiliated entities.[24/] In fact, rather than establish a formal process to solicit capacity requests from potential video programmers, SNET, Pacific, US WEST,[25/] and, initially, Bell Atlantic,[26/] acted to ensure that their affiliated or favored programming entities, rather than truly independent video programmers, would secure the lion's share of capacity on their video dialtone platforms under preferential terms and conditions that were not available to unaffiliated providers. Unless the Commission's rules clearly bar such conduct, experience teaches it will flourish.

Open, verifiable, and prospective rules will further Congress' goals to reduce regulation and promote nondiscrimination without repeating the shortcomings of the video

---

[23/](...continued)
Bell; William F. Reddersen, BellSouth Corporation; Thomas M. Barry, Southwestern Bell Corp.; and Robert C. Calafel, GTE Corp.; Pacific Video Dialtone Service Tariff FCC No. 135 at 2.2.2(A); Description and Justification at 2-3; see also "Pacific Bell signs first video programmer," Connections, August 1, 1994 (attached to Letter of September 19, 1994 to Reed E. Hundt from Spencer R. Kaitz, California Cable Television Association).

[24/] See Application of SNET for Approval to Conduct a Dial Tone Transport and Switching Marketing Trial, Connecticut Department of Public Utility Control ("Connecticut DPUC"), Decision at 14-15 (June 30, 1995) (Connecticut DPUC found that SNET's allocation of 49 of the 53 available broadcast channels to a single video programmer caused capacity problems).

[25/] See infra Section III.B.

[26/] As originally proposed, the agreement between Bell Atlantic and its favored programmer, FutureVision of America Corp. ("FutureVision") committed 94% (60 of 64 channels) of the capacity on the Dover System to FutureVision. In the Matter of New Jersey Bell Telephone Company, File No. W-P-C 6840, 9 FCC Rcd 3677, 3680, n.44 (1994) ("Dover 214 Order"). After questions were raised regarding whether Future Vision's presence on the Dover Township system and its apparent right to control 60 of the 64 available channels were consistent with the video dialtone nondiscrimination and platform capacity requirements, Bell Atlantic amended its arrangement with FutureVision to restrict the use of any one programmer to 50 percent of the initial capacity as well as committed to expanding the platform capacity. Id.

dialtone regulatory process.[27/] First, such uniform regulation would provide OVS operators, video programmers, and competitors with easily understood and necessary guidance regarding those practices that the Commission finds are essential to compliance with the 1996 Act.[28/] Second, as demonstrated by certain aspects of Bell Atlantic's channel reservation process for video dialtone in Dover Township,[29/] such a plan can be relatively easy to establish and administer and should help provide interested programmers a framework from which to make business decisions regarding participation in OVS. Third, the rules would clearly define the nature of the obligations that OVS operators have and distill some of the key regulatory differences between OVS and cable. Finally, such regulations will ultimately reduce regulatory by eliminating the need for the Commission to entertain unnecessary proceedings to resolve the disputes that will otherwise arise if the

---

[27/] See 1996 Act, §§ 653(a)(1), (b)(1)(A).

[28/] Id. at § 653(b)(1)(A).

[29/] While Bell Atlantic's video dialtone tariff in Dover Township, New Jersey proved deficient in many respects, its channel reservation mechanism ultimately provided a framework to establish firmly the ground rules for interested video providers with respect to open enrollment, channel allocation, and channel positioning that Joint Commenters believe can help promote the non-discriminatory goals of OVS. Here too, however, Bell Atlantic initially attempted to confer special treatment upon its favored video programmer in the form of channel reservation deposit exemptions, pre-allocated channels, and preferential channel positioning. See In the Matter of Bell Atlantic Telephone Companies, Revisions to Tariff FCC No. 10, Rates, Terms and Regulations for Video Dialtone Service in Dover Township, New Jersey, Transmittal Nos. 741, 786, CC Docket No. 95-1457 Opposition of Rainbow Programming Holdings, Inc. to Bell Atlantic Direct Case at 8-9 (filed Nov. 30, 1995) ("Rainbow Opposition"). Such discriminatory practices were averted only after Commission intervention. Id.

Commission adopts only a general prohibition against discrimination, to be defined on a case-by-case basis.[30/]

c. OVS Operators Must Be Precluded from Controlling Over One Third of OVS Channel Capacity

Section 653 of the 1996 Act also requires the Commission to adopt regulations prohibiting OVS operators and their affiliates from selecting programming for more than one-third of the system capacity, if demand so dictates.[31/] Given this Congressional mandate, the FCC must limit OVS operators and affiliates to no more than one-third of the non-shared, non-PEG, activated capacity on an OVS platform and to relinquish capacity to the extent there is insufficient capacity to meet future demand.[32/] In addition, the Commission should prohibit OVS operators from prescribing minimum or maximum capacity requirements for unaffiliated programmers. Such restrictions on unaffiliated programmers are contrary to the pro-competitive nature of OVS, which is designed to minimize the considerable incentive that OVS operators have to discriminate in favor of themselves and their affiliates.[33/] Permitting OVS operators to impose minimum or maximum capacity restraints will likely

---

[30/] Thus, the Commission's suggestion that it may forgo prospective rules in favor of "regulation that simply prohibits an open video system operator from discriminating against unaffiliated programmers in its allocation of capacity" should be soundly rejected. See NPRM at ¶ 12.

[31/] See 1996 Act, § 653(b)(1)(B).

[32/] NPRM at ¶ 20. See 1996 Act, § 653(b)(1)(B). In measuring the one-third capacity that would be allocated to OVS operators and their affiliates, Joint Commenters agree with the Commission's tentative conclusion that channel capacity for public, educational, or governmental ("PEG") use should not be counted against the one-third of capacity that an open video system operator or its affiliates may select. NPRM at ¶ 19.

[33/] See Id. at ¶ 10.

enhance, not minimize, an OVS operator's ability to chill competition from unaffiliated video programmers.[34/] Accordingly, such limitations should be generally barred.

The Commission should also recall its experience with video dialtone regarding the measurement of capacity on open video systems that employ "digital" and "switched video technology."[35/] Thus, the Commission should not attempt to answer this question in the abstract. On the whole, despite the rosy forecasts for digital and switched video systems, the fact is that such systems are a long way from being generally deployed.[36/] In the rare instances where they are deployed, such as Bell Atlantic's Dover Township system, the Commission can adhere to its generally applicable rule of nondiscrimination. What the Commission should not do, however, is allow OVS operators to deploy an analog system and use the promise of future digital capacity to frustrate nondiscrimination goals. In light of the realities of today's systems, therefore, the Joint Commenters urge the Commission to focus

---

[34/] Significantly, in the analogous context, leased access under Section 612, 47 U.S.C. § 532, the Commission has found there has been demonstrated demand by video programmers for less than full channel capacity. The Commission has found that such part-time capacity substantially serves the public interest. See FCC News Release, Commission Adopts Order and Further Notice of Proposed Rulemaking Regarding Rules for Cable Television Leased Access Commercial Access, MM Docket No. 92-266 and CS Docket No. 96-60, March 21, 1996.

[35/] NPRM at ¶ 18.

[36/] See, e.g., Patty Wetli, "It's Beginning to Look A Lot Like Cable; Video Dialtone," America's Network (Nov. 1, 1995); Evan Birkhead, "Reality Check: The Overselling of the Information Superhighway," Internetwork at 49 (Sept. 1995); Anthony Giorgianni, "Digital Delays Cost SNET Jobs," Hartford Courant, (Jan. 12, 1996) at F1; Kent Gibbons, "SNET Drops Digital from VDT Trial Plan," Multichannel News at 3 (Sept. 11, 1995).

on the analog systems that are being planned and deployed today and postpone conclusions with respect to hypothetical future systems.[37/]

d. The Commission's Regulations Must Bar Preferential Treatment of Favored Programmers Even if They Are Not "Affiliates"

Finally, if the Commission is serious about promoting an open video system that embodies the dual goals of competition and nondiscrimination, the Joint Commenters assert that the Commission's rules must recognize that the definition of "affiliate" does not always include all entities on which OVS operators may nonetheless have a strong incentive to confer preferential treatment.[38/] Thus, for OVS purposes, the regulations regarding fair allocation of capacity and selection of programmers must address situations in which there is a clear financial incentive to act anticompetitively.[39/] As revealed time and again, video dialtone operators most often entered favored relationships with selected video programmers which were the antithesis of arms-length, nondiscriminatory transactions.[40/] That these

---

[37/] Significantly, such systems promise virtually to eliminate existing capacity constraints. For example, video programmers have reserved only approximately 300 of 384 channels on Bell Atlantic's video dialtone system. See "BA Dover VDT Network," Broadcasting & Cable at 69 (Feb. 5, 1996). To the extent there is proven unlimited capacity, Commission regulations may not be necessary, as capacity limitations would not exist.

[38/] See 47 C.F.R. § 63.08 (lines outside of a Carrier's Exchange Telephone Service Area). As defined in 47 C.F.R. § 63.08, "the term 'affiliate' bars any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship." The Commission should also clarify that this definition applies fully to open video systems within the carrier's service area.

[39/] See id.

[40/] Such relationships were forged notwithstanding the requirement that video dialtone platform providers were to act as a completely indifferent provider of a video transmission conduit. See NCTA v. FCC, 33 F.3d 66, 71 (D.C. Cir. 1994).

programmers did not rise to the technical level of "affiliation" did not change these anticompetitive incentives.

For example, under the carriage agreement between SNET and Connecticut Choice Television ("CCT"), SNET had a direct financial incentive to discriminate in favor of CCT at the expense of other programmers on the platform. SNET had a conditional purchase option in the bulk of CCT's capacity, a right to veto any potential third-party purchase of CCT, and a right to acquire CCT's business interest.[41/] Likewise, under Pacific's video dialtone structure, Pacific had conditional purchase options in two video programmers, Anchor Pacific and California Standard Television Corporation ("CSTC"), which together controlled 60 percent of the analog capacity on Pacific's video dialtone platform.[42/] Similarly, in Dover Township, New Jersey, there was evidence of a continuing preferential arrangement between Bell Atlantic and one particular video information provider -- FutureVision -- that enabled FutureVision to provide service at announced rate levels that no other competitor could legitimately match if it was not so-favored.[43/]

There is no reasonable basis for the Commission to conclude that OVS operators will act in a nondiscriminatory manner with respect to channel capacity and allocation decisions regarding favored programmers, any more so than with the video dialtone proposals to date,

---

[41/] CCT Agreement at §§ 12.1-12.4 (public version).

[42/] See, e.g., "Pacific Bell Signs First Video Programmer," Connections, August 1, 1994 (attached to Ex Parte Letter of September 19, 1994 to Chairman Reed E. Hundt from Spencer R. Kaitz, California Cable Television Association).

[43/] See Bell Atlantic Telephone Companies, Revisions to Tariff FCC No. 10, Rates, Terms, and Regulations for Video Dialtone Service in Dover Township, New Jersey, Transmittal Nos. 741, 786, CC Docket No. 95-145, Rainbow Opposition at 6-26.

the risk of such anticompetitive behavior by OVS operators in favor of entities in which they have an interest is not hypothetical. Because Congress dictated that one-third of an OVS platform's capacity will be allocated to the OVS operator or its affiliate and two-thirds to unaffiliated programmers, the Commission must adopt rules requiring nondiscrimination and equality not only with respect to treatment of "affiliates," but also with respect to situations of actual and prospective ownership or financial interests between the OVS operator and the video programmer.

2. The Commission Must Ensure that OVS Operators Do Not Abuse Channel Sharing

In addition to establishing clear rules prohibiting discrimination by OVS operators in the selection and allocation of the capacity, the Commission must also ensure that channel sharing is not used to advantage favored and affiliated programmers and essentially to provide traditional cable service under the guise of OVS.[44/] Channel sharing should not become a means to allow the OVS operator to demand video programmers "share" the channels that offer common video programs. While proponents of channel sharing believe it provides efficiencies and increases programming diversity,[45/] as the Commission has recognized in the past, channel-sharing proposals can raise genuine fairness and other

---

[44/] The 1996 Act permits OVS operators to implement channel sharing. 1996 Act, § 653(b)(1)(C). The stated purpose of this provision is "to permit an [OVS] operator to require channel sharing . . . provided that subscribers have ready and immediate access" to any shared channels. Conference Report at 177.

[45/] See NPRM at ¶ 36.

concerns, especially with respect to the terms and conditions under which shared channels are made available to video programmers.[46/]

While the 1996 Act explicitly allows channel sharing,[47/] the Commission must implement the governing regulations in a manner that is faithful to the basic pro-competitive and nondiscriminatory premises of OVS. Thus, contrary to the Commission's tentative conclusion, the 1996 Act does not permit an OVS operator to choose "how and which programming will be selected for shared channels."[48/] Rather, the statute provides an OVS operator with the ability to determine whether or not to implement a channel sharing arrangement.[49/] The underlying premise remains that an OVS operator shall not engage in unreasonable discrimination.[50/] Shared channels are not and should not become a "basic tier" controlled by the OVS operator. Instead, to the extent they are offered, they should be a mechanism that benefits all video programmers equally, whether affiliated or independent.

[46/] See id. at ¶¶ 36-41. Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order On Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 371 (1994) ("Video Dialtone Reconsideration Order"). Indeed, the Commission elsewhere has recognized that channel-sharing arrangements "raise significant legal and policy issues, such as the possibility of unreasonable discrimination." In the Matter of the Applications of Pacific Bell, FCC 95-302, W-P-C Nos. 6913-6916, at ¶ 32 (rel. August 15, 1995) ("Pacific Bell Order"). The Commission has also stressed that channel-sharing proposals must conform to, and not supplant, the principles of non-discrimination. Video Dialtone Reconsideration Order, 10 FCC Rcd at 371.

[47/] 1996 Act, § 653(b)(1)(C).

[48/] NPRM at ¶ 37. Nor is the Commission correct in tentatively concluding that an OVS operator should be allowed to choose the entity that administers the channel sharing arrangement. Id.

[49/] 1996 Act, § 653(b)(1)(C).

[50/] See id. at § 653(b)(1)(A).

Joint Commenters' experience with the LECs' deployment of video dialtone foreshadows the likelihood that OVS operators will seek to exclude unaffiliated or non-favored video programmers from any genuine role in the process of selection of the shared channel programming services.[51/] For example, channel-sharing plans proposed by both Pacific and SNET were designed to preserve and strengthen unlawful discriminatory advantages afforded to programmers with which they were directly or indirectly affiliated. SNET's channel-sharing plan in effect requested that the Commission ratify a channel-sharing arrangement that SNET forged with its favored programmer, CCT, almost two years earlier.[52/]

With respect to Pacific, the Commission felt so strongly that Pacific's channel sharing plan was without merit that it required that Pacific request additional authority under Section 214 when it granted Pacific's video dialtone applications.[53/] Pacific developed a channel-sharing proposal that was to be administered by CSTC, a favored entity.[54/] It required video programmers to commit to distributing unknown programming services, pay an unspecified deposit amount, and bear an unknown portion of shared programming costs

---

[51/] See Video Dialtone Reconsideration Order, 10 FCC Rcd at 371. While the video dialtone rules and regulations have been repealed by the 1996 Act, § 302(b)(3), the basic policy issues raised by channel sharing plans remain unchanged.

[52/] See Application of SNET, to Amend Existing Authorization to Construct and Operate, on a Trial Basis, A Video Dialtone Platform for Provision of Programming to Subscribers, File No. W-P-C 6858, Petition to Deny of Cablevision and The New England Cable Television Association, Inc. at 39-48 (filed Sept. 26, 1995).

[53/] See Pacific Bell Order, supra.

[54/] See supra n.46.

computed according to an unspecified formula.[55/] In effect, Pacific sought to force the Commission and prospective unaffiliated video programmers, to buy sight unseen its channel-sharing plan.[56/] Unless the Commission establishes clear guidelines as to what is and is not acceptable, this pattern will almost certainly continue. Indeed, abuses will likely flourish.

If the Commission is to ensure channel sharing plans do not enable OVS operators to act as de facto cable operators, the Commission should prescribe rules for channel sharing that require: (i) all initial video programmers on the platform are involved in the process of selecting the programming for the shared channels; (ii) a shared channel cost-sharing formula does not require unaffiliated programmers to bear a disproportionate share of the costs; and (iii) OVS operators may not enter into arrangements which could disproportionately favor the OVS operator or its affiliated programmer with respect to the distribution of advertisement availabilities ("ad avails") and related revenue. Moreover, to promote the underlying OVS goals to the maximum extent, the Commission should also require that channel sharing arrangements are structured and administered in a nondiscriminatory fashion by an independent third party agreed to by all video programmers on the platform.

3. The FCC Must Prevent the Provision of Marketing Services from Skewing Unfairly the Competitive Video Marketplace

Critically, the 1996 Act also seeks to prevent discrimination in favor of an open video system operator or its affiliates with regard to "material or information (including advertising) provided by the operators to subscribers for the purposes of selecting

---

[55/] Application of Pacific Bell, Pacific Amendment and Request for Expedited Modification, File Nos. W-P-C 6913, 6916, at 5-7 (filed Dec. 8, 1995); CCTA Petition to Deny at 14-21.

[56/] Id.

programming on the open video system, or in the way such material or information is presented to subscribers."[57/] Thus, the 1996 Act mandates that the Commission implement regulation which prevents the provision of marketing services and other critical aspects of service provision from undermining the goals of OVS and from disadvantaging competing video service providers.[58/] Central to the Commission's determinations in this regard are decisions involving joint marketing and subscriber information.

First, the Commission should establish clear rules with respect to the joint marketing of OVS and voice telephony services by LECs in order to ensure that it is not tilting the competitive playing field unfairly. In order to promote parity and enhance opportunities for facilities-based competition, the Commission should prohibit joint marketing by an incumbent LEC until such time that the incumbent cable operator undertakes such joint marketing.[59/] Given the overwhelming advantages that incumbent LECs have as a result of their monopoly enterprises, such a rule would assist greatly in fostering true competition.

[57/] 1996 Act, § 653(b)(1)(E).

[58/] Id.

[59/] For example, to avoid the possibility that a LEC could use its monopoly-derived customer lists to gain an unfair advantage in the outbound telemarketing of unregulated services, the Commission should bar such telemarketing at least until the LEC can show that a competing multichannel video programming distributor is engaged in the outbound joint marketing of local telephony and video services.

Thereafter, relying on its experience in implementing "equal access"[60/] and customer premises equipment ("CPE") rules,[61/] the Commission should require that for all inbound telemarketing,[62/] OVS operators advise customers of their video services options. Thus, just as the Commission required specific information be given to consumers with respect to interexchange providers and the availability of CPE from independent vendors, the Commission should limit the inbound telemarketing or referral services provided by the OVS operator to a listing, on a rotating basis, of video programmers and cable operators, including the OVS operator's programming affiliate, that request such a listing service. Moreover, to prevent the OVS operator from using its inbound telemarketing in a manner that disadvantages a video programmer utilizing OVS or other video service providers, such as cable operators, the OVS operator should be prohibited from including any information about the price, terms, or conditions of the video services offered by any video programmer or other video program provider, as well as engaging in comparisons of various video programmers and other service providers.

[60/] See Investigation of Access and Divestiture Related Tariffs, Memorandum Opinion and Order, 101 F.C.C.2d 911, 928 (1985) (requiring the LECs to notify end users of their options between IXCs).

[61/] These rules are analogous to the Commission's rules governing the joint marketing of local telephone service and customer premises equipment by LECs. See Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Order, 66 RR 2d 1551, 1554 (1989).

[62/] "Inbound telemarketing" refers to telemarketing or referrals that occurs during a call initiated by a customer or a potential customer of the service

4. Rules Requiring An OVS Operator To Make Programming Contracts Public Will Reduce Discrimination

The Commission tentatively concluded "that an OVS operator should be required to make its contracts with all video programmers publicly available, which will disclose the rates charged to programming providers and other terms and conditions of carriage."[63/] The Joint Commenters strongly support this tentative conclusion given the pattern of private dealings that occurred with video dialtone and urge the Commission to clarify that these key contracts cannot and should not be hidden under the claim of "confidentiality."[64/] Full and open disclosure of the contractual relationship between OVS operators and video providers on the OVS platform will promote nondiscrimination and fair dealings that must be the bedrock of an open video system. Indeed, failure to do so will create a strong incentive for OVS operators to act as traditional cable operators, contrary to the new statutory paradigm.

B. REGULATORY PARITY DEMANDS THAT THE COMMISSION ENFORCE ALL TITLE VI OBLIGATIONS THAT ARE MANDATED BY THE ACT

As a matter of parity and competitive equity, the 1996 Act mandates that the Commission apply all Title VI requirements to OVS operators, except those that are inapplicable because the OVS operator qualifies for "reduced regulatory burdens."[65/] As

---

[63/] NPRM at ¶ 34.

[64/] In one particularly egregious instance, a LEC intentionally parsed out selected words of a protected video dialtone carriage agreement before the FCC and then subsequently sought to withhold all remaining words in the contract from review. See, e.g., In the Matter of SNET, File Nos. W-P-C 6858, 7074, Order, 10 FCC Rcd 10588 (1995) (requiring SNET to file CCT Agreement); see also Joint Motion for Production of Cablevision, NECTA, NCTA, TCI, and Cox at 4-6 (filed July 26, 1995).

[65/] See 1996 Act, § 653(a) (setting forth general framework) and (c) (setting forth reduced regulatory burdens).

Congress expressly provided that the obligations imposed on OVS operators should be "no greater or lesser" than obligations imposed on cable operators,[66] the Commission's rules must clearly and fully apply the requirements of Title VI.

1. OVS Operators Must Comply With PEG, Must-Carry, and Retransmission Consent Requirements

OVS operators are required by the explicit language of the Act to comply with Sections 611, 614, and 615 and Section 325 of Title III,[67] which detail: the obligations of cable operators, and now OVS operators, to provide channels for public, educational, or governmental ("PEG") use; must-carry obligations; and retransmission consent requirements. In order to achieve the robust competition that is the overarching objective of the 1996 Act, each of these statutory obligations must be applied to OVS operators just as they are applied to cable operators.

With respect to PEG access obligations, the Commission seeks comment on how it should implement this provision given the fact that OVS operators do not have a franchise requirement and may provide service in multiple cable franchise areas.[68] The Commission's concern about the absence of a franchise requirement, however, is misplaced. Congress certainly understood that PEG access requirements are now imposed by localities to meet critical localism goals.[69] Thus, the Commission can require OVS operators to

---

[66] Id. at § 653(c)(2)(A); see NPRM at ¶ 57.

[67] 1996 Act, § 653(c)(1)(B).

[68] NPRM at ¶ 57.

[69] 47 U.S.C. § 531(a).

comply with these obligations in all areas they offer service.[70/] Likewise, that open video systems may offer services to more than one cable franchise area is no reason to reduce obligations in this regard. Indeed, today cable operators operate in multiple cable franchise territories and must comply separately with each municipality's requirements.

There is absolutely no basis for the Commission to require cable systems to share PEG channels, either by interconnecting or otherwise, with an OVS operator.[71/] Such an interconnection or sharing requirement would undermine the Congressional objective of competitive parity[72/] by imposing all PEG obligations on cable operators and none on OVS operators. In fact, even obligating OVS operators to fund their share of the costs associated with providing PEG programming, standing alone, is unfair as PEG obligations frequently extend far beyond the simple payment of funds.[73/] Moreover, as PEG obligations frequently involve capital outlays made by cable companies over a long period of time, requiring interconnection would permit OVS operators to benefit unfairly from expenses incurred over that period of time. Notably, in some cases, cable operators voluntarily make significant additional investments in PEG services to distinguish their own offerings. OVS operators should not be permitted to profit from cable operators' investments.

[70/] See NPRM at ¶ 57.

[71/] See Id. at ¶ 57.

[72/] See Conference Report at 178.

[73/] For example, cable operators often devote considerable human resources, equipment, and studio space to PEG programming. Yet, if the Commission truly seeks to implement a nondiscriminatory system based solely on remittance of funds for PEG access, cable operators should also have such an option.